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No. 92-225

In The

Supreme Court of the United States

October Term, 1992

FIRST FIDELITY BANK, N.A., NEW JERSEY,

Petitioner,

v.

THEODORE RUDBART, NATALIE RUDBART, BEVERLY LITOFF, BENJAMIN WELTMAN, MADELINE OKIN FOR HERSELF AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED, AND NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of New Jersey

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

The issues which Petitioner First Fidelity Bank, N.A., New Jersey ("First Fidelity") raises before this Court in its petition for certiorari do not raise genuine federal issues for which this Court's appellate jurisdiction can be exercised. First, the decision of the New Jersey Supreme Court below did not require First Fidelity to breach the Chinese Wall that is erected between a national bank's investment and trust departments pursuant to 12 C.F.R. § 9.7(d). That court ruled that under the circumstances First Fidelity was obligated, consistent with its fiduciary obligations as trustee, to notify its trust department that the notes were called for early redemption and to give the respondents mail notice of the early redemption. Since this information is not material insider information in connection with any decision or recommendation to purchase or sell any security, and since 12 C.F.R. § 9.7(d) only precludes the communication of such material insider information by other departments of a national bank to its trust department, that regulation is inapplicable to the case here.

Second, the court below accorded due deference to the prior federal action arising from the early redemption of the notes. In that federal action, the United States District Court for the District of New Jersey dismissed on a summary judgment motion the sole federal claim that the respondents had asserted in the federal action, namely, that failure to give notice of the early redemption constituted a violation of the federal securities laws. That court dismissed the respondents' pendent state law claims including their claim for breach of fiduciary duty for lack of subject matter jurisdiction, noting that state

court is the proper forum in which to litigate those claims. Since federal regulations provide that First Fidelity's fiduciary obligations to the respondents as trustee are defined and interpreted under the law of the State of New Jersey, respondents' cause of action for breach of fiduciary duty arises under and was properly decided by the court below under state law. Since that claim was a state law claim, the court below was not precluded by the prior federal action from deciding that claim.

Finally, First Fidelity was not deprived of due process in this case. Although First Fidelity did not present its arguments on the theory of breach of fiduciary duty to the New Jersey Supreme Court, that court expressly gave First Fidelity the opportunity to present its arguments on all theories of liability that the respondents had pleaded, which included breach of fiduciary duty. First Fidelity therefore received both notice of the claims that the court was considering and an opportunity to be heard on those claims. Also, that court's presumption that First Fidelity was compensated for the capacities in which it served in connection with the notes is supported by evidence in the record, and therefore is not an assumption from no evidence as First Fidelity incorrectly argues.

First Fidelity asserts that this Court has appellate jurisdiction over this case pursuant to 28 U.S.C. § 1257(a). However, the judgment of the New Jersey Supreme Court below does not question the validity of any federal statute or regulation and does not impinge on any due process protections afforded to First Fidelity under the United States Constitution. Therefore, there is no basis on which this Court can exercise its jurisdiction over this

matter, and First Fidelity's petition for certiorari must be denied.

ARGUMENT

POINT I

THE DECISION BELOW IS CONSISTENT WITH FEDERAL REGULATIONS ENACTED PURSUANT TO THE NATIONAL BANK ACT WHICH REQUIRE THAT NATIONAL BANKS SEPARATELY MAINTAIN THEIR TRUST DEPARTMENTS FROM OTHER DEPARTMENTS IN THE BANK AND WHICH ADDRESS THE DUTY OF NATIONAL BANKS TO INVEST FUNDS AWAITING DISTRIBUTION.

a. The Information that First Fidelity Failed to Communicate to its Trust Department was not Subject to the Chinese Wall.

The Chinese Wall that is erected pursuant to 12 C.F.R. § 9.7(d) does not preclude the exchange or dissemination of *all* information from a trust department to an investment department of a national bank. That regulation requires that a national bank exercising fiduciary powers adopt policies and procedures to ensure that federal securities laws are complied with in connection with decisions or recommendations to purchase or sell securities, to "ensure [that] the national bank trust departments shall not use material inside information in connection with any decision or recommendation to purchase or sell any security." *Id.*

Indeed, First Fidelity in its petition for certiorari filed with this Court concedes that the Chinese Wall does not

preclude the exchange of *all* information between a trust department and other departments of a national bank exercising fiduciary powers, but rather applies to "prevent the communication of *material inside information* to bank officers responsible for *making or recommending purchases and sales of securities.*" First Fidelity's petition for certiorari at 10 (emphasis added). *See also id., quoting* Leo Herzel and Dale E. Colling, *The Chinese Wall Revisited,* 6 Corp. L. Rev. 116, 119 (1983) (the Chinese Wall prevents the communication of "certain kinds of information" between departments of banks, implicitly acknowledging that other kinds of information may be exchanged).

The information here which First Fidelity contends could not be communicated from its investment department to its trust department, *i.e.,* that the notes had been called for early redemption and that the investment department was notifying each of its customers of that fact, was unrelated to any decision or recommendation to purchase or sell securities. No party below has ever contended and the record is barren of any evidence suggesting that the information which First Fidelity contends could not be communicated related to the purchase or sale of securities. Accordingly, the Chinese Wall had no application in this case and did not preclude the exchange of the type of information at issue here. For this reason, the decision of the Supreme Court of New Jersey is not inconsistent with and does not ignore, as First Fidelity contends, the Chinese Wall created by 12 C.F.R. § 9.7(d).

Moreover, if this Court were to accept First Fidelity's interpretation of 12 C.F.R. § 9.7(d) as precluding the communication from First Fidelity's investment department

to its trust department that the notes were redeemed early, it would, in effect, be rewriting that regulation to preclude the dissemination of *all* information of *any* kind to a trust department. Had the drafters of 12 C.F.R. § 9.7(d) so intended, they would have explicitly so stated. Instead, the drafters of that regulation expressly limited the information encompassed therein to information relevant to decisions or recommendations to purchase or sell securities, information not of the type at issue here. Therefore, there is no reason based on 12 C.F.R. § 9.7(d) why that information could not have been passed from the investment department to the trust department.

In a failed attempt to demonstrate that the New Jersey Supreme Court's decision conflicts with 12 C.F.R. § 9.7(d), First Fidelity in its petition for certiorari raises the concern that as a result of the New Jersey Supreme Court's decision, its trust department and investment department will have to communicate on a regular basis to make sure that First Fidelity complies with its fiduciary duties, and that as a result it is inevitable that material insider information will be communicated and that the Bank will be violating federal banking and securities laws. This concern misconstrues the New Jersey Supreme Court's decision and is totally unfounded.

First, as discussed above, the information which the New Jersey Supreme Court required First Fidelity to communicate to its trust department consistent with First Fidelity's capacity as trustee is not subject to the Chinese Wall. Second, there is no requirement in that court's decision that the investment department communicate *directly* with the trust department in all instances where the Bank is acting as a trustee. First Fidelity like all

national banks is made up of many departments, which report to a senior administrative level. If First Fidelity is concerned that if its departments communicate directly with each other then its investment department may unintentionally disclose "material insider information" to the trust department, then those departments need not communicate directly with each other, but rather need simply communicate information regarding their activities to the senior level at the Bank. That senior level may then assess the information, determine whether it is subject to the Chinese Wall, and if it is not, decide whether in its capacity as trustee it must disclose that information to its trust department.

The New Jersey Supreme Court thus recognized that First Fidelity cannot be shielded from its responsibilities as trustee simply because it has a trust department as well as other departments:

> Although First Fidelity has a trust department, an investment department, and other departments or functions, it was First Fidelity that was appointed trustee, not one of its departments. It had fiduciary responsibilities under the terms of the resolutions, and those were not negated by federal law or a lesser standard of trusteeship. The bank is charged, or should be charged here, with knowledge of all of the actions of all its departments and subdivisions, whether or not one department had actual contact with another.

127 N.J. at 377, 605 A.2d at 697 (Petrella, J., concurring) (footnote omitted).

For these reasons as well, First Fidelity's characterization of the *per curiam* and concurring opinion's "treatment of the separation [of the trust department of a national bank] as a mere moving of boxes on an organization chart" is absurd. No part of the New Jersey Supreme Court's decision suggests that the court ignored the requirement that a national bank separate its trust department from the rest of the bank or believed that it was unnecessary for First Fidelity to comply with applicable federal regulations. However, as discussed above, the fact that a trust department must be separately maintained from other departments does not insulate the bank from knowing what is going on in each of its departments and from disseminating that information to the trust department when doing so will not violate federal regulations (*i.e.*, the Chinese Wall) and is necessary to satisfy fiduciary and fairness obligations.

b. The Decision of the Court Below was not Predicated on 12 C.F.R. § 9.10(a), Which Addresses the Obligations of a National Bank Acting as Fiduciary to Invest Funds Awaiting Distribution, but is Nevertheless Entirely Consistent With that Regulation.

The New Jersey Supreme Court expressly stated that it did not predicate its holding on 12 C.F.R. § 9.10 or N.J.S.A. 17:9A-35(D), and that it did not "intend to create in this case . . . a cause of action for breach of such directives. We intend only to remedy any unjust enrichment." 127 N.J. at 367; 605 A.2d at 692. Yet First Fidelity nevertheless contends that the New Jersey Supreme Court's comments regarding these statutory provisions

provide a basis on which this Court should grant certiorari. This contention must be rejected.

12 C.F.R. § 9.10(a) provides as follows:

> Funds held by a national bank in a fiduciary capacity which are awaiting investment or distribution shall not be held uninvested or undistributed any longer than is reasonable for the proper management of the account. Each national bank exercising fiduciary powers shall adopt and follow written policies and procedures intended to ensure that the maximum rate of return available for trust-quality, short-term investments is obtained upon funds so held, consistent with the requirements of the governing instrument and local law. Such policies and procedures shall take into consideration all relevant factors, including but not limited to the anticipated return that could be obtained while the cash remains uninvested or undistributed, the cost of investing such funds, and the anticipated need for the funds.

N.J.S.A. 17:9A-35(D)(1) similarly provides that a bank acting in a fiduciary capacity which is holding funds for disbursement shall invest or deposit those funds so that they produce a "rate of return commensurate with the short-term market rate of return then prevailing." It further provides that such a bank shall not be required to invest the funds "if it is not permitted under the terms of the instrument governing the fiduciary capacity in which it serves, or by the person empowered to direct investments, to receive reasonable compensation for providing these services, unless the . . . bank expressly agrees to provide the investment services without compensation." N.J.S.A. 17:9A-35(D)(1).

First Fidelity specifically relies on a *dicta* comment made in a footnote to Judge Petrella's concurring opinion which, it contends, reflects that the New Jersey Supreme Court misconstrued and thereby undermined 12 C.F.R. § 9.10(a) and N.J.S.A. 17:9A-35(D)(1). Petition for certiorari at 11-12. Judge Petrella, after finding that First Fidelity had fiduciary responsibilities to all noteholders under the terms of the resolutions "which were not negated by federal law or a lesser standard of trusteeship", 127 N.J. at 377, 605 A.2d at 697, said in a footnote that

> [t]his [fiduciary responsibility] is aside from obligations imposed by law. 12 C.F.R. § 9.10 and N.J.S.A. 17:9A-35(D) appear to assume that unclaimed fiduciary funds are not to be held uninvested longer than reasonably necessary for proper account management.

127 N.J. at 377 n. 8; 605 A.2d at 697 n. 8.

Contrary to First Fidelity's assertion, the New Jersey Supreme Court did not misconstrue 12 C.F.R. § 9.10(a) or N.J.S.A. 17:9A-35(D). In the first place, N.J.S.A. 17:9A-35(D) had not even been enacted at the time that the notes were called for early redemption. That section of the statute was not enacted until December 1986, approximately six months *after* First Fidelity failed to give mail notice of the early redemption, and applied prospectively. N.J.S.A. 17:9A-35, Historical and Statutory Notes (West Supp. 1992) ("no bank shall be required to comply with the provisions of this act for 90 days following the effective date.") *Id. See also Twiss v. State of New Jersey, Dep't of Treasury,* 124 N.J. 461, 466, 591 A.2d 913, 918 (1991); *Frieman v. Randolph Tp.,* 185 N.J. Super. 152, 162

(App. Div. 1982) (It is normal rule of statutory construction that amendments to a statute are given prospective application only unless the changes are merely procedural or the legislature specifically indicates otherwise). Thus, whether the New Jersey Supreme Court misconstrued N.J.S.A. 17:9A-35(D) is irrelevant, as that statute had no bearing on First Fidelity's investment duties with respect to the respondents' funds that it was holding.

As to 12 C.F.R. § 9.10(a), the New Jersey Supreme Court's summary of that regulation's provisions is in fact accurate. Moreover, that court's holding did not undermine 12 C.F.R. § 9.10(a). The New Jersey Supreme Court held that First Fidelity as trustee owed a fiduciary duty to the noteholders to treat all of them fairly, and that First Fidelity breached this duty by giving mail notice of the early redemption to some but not all of the noteholders. In order to remedy this breach, that court imposed a constructive trust and held that the respondents are entitled to recover at least some of the interest earned on their money while it was retained by First Fidelity. 127 N.J. at 365-368; 605 A.2d at 690 - 692.

While First Fidelity may not have been obligated to invest the proceeds of the redeemed notes under 12 C.F.R. § 9.10(a), there is nothing in that regulation which *precluded* First Fidelity from doing so, either because it chose to do so voluntarily or because it was obligated to do so for another reason. Surely First Fidelity would not contend that if it decided to invest the respondents' funds it would have "undermined" 12 C.F.R. § 9.10(a). Similarly, that the New Jersey Supreme Court concluded that First Fidelity under the circumstances here should have

invested the funds for the respondents' benefit consistent with its fiduciary duty since it breached that duty by failing to give them mail notice of the redemption does not undermine that regulation.

Furthermore, even though the New Jersey Supreme Court did not predicate its holding on 12 C.F.R. § 9.10(a), its decision below is nevertheless entirely consistent with that regulation. That section provides that a national bank holding funds in a fiduciary capacity shall not hold those funds uninvested "any longer than is *reasonable* for the proper management of the account." 12 C.F.R. § 9.10(a) (emphasis added). Under the circumstances here, where First Fidelity breached its fiduciary duty to the respondents by failing to give them mail notice of the early redemption, it was unreasonable for First Fidelity to hold those funds for any period of time after the notes were redeemed without investing them for the respondents' benefit.

Finally, First Fidelity errs in its contention that the "decision below fails to recognize that a national bank's duty to invest is fully regulated by federal law." Petition for certiorari at 14. By its express terms, 12 C.F.R. § 9.10(a) requires a national bank acting in a fiduciary capacity to "follow written policies and procedures . . . consistent with the requirements of the governing instrument and local law." As discussed *infra* at Point II, First Fidelity's fiduciary duties; including its duty to invest; are governed by the law of the State of New Jersey, and not by federal law. Thus, First Fidelity's contention that its duty to invest is "fully regulated by federal law" is wrong as a matter of law.

POINT II

SINCE FIRST FIDELITY'S FIDUCIARY OBLIGATIONS TO THE RESPONDENTS ARE DETERMINED BY STATE LAW, RESPONDENTS WERE NOT REQUIRED TO SEEK ADJUDICATION OF THAT ISSUE IN THE PRIOR FEDERAL ACTION AND THE NEW JERSEY SUPREME COURT PROPERLY ADDRESSED THAT ISSUE ALONG WITH RESPONDENTS' OTHER STATE LAW CLAIMS.

At point II of its petition for certiorari, First Fidelity asserts that the New Jersey Supreme Court should not have addressed the issue of whether First Fidelity breached a fiduciary duty to the respondents because First Fidelity's duties and responsibilities as a trustee are governed exclusively by federal law, thus presenting a federal question the adjudication of which was precluded under principles of *res judicata* since it was not raised in the prior federal action. This argument ignores the fact that the trust powers of national banks are subject to state control and that therefore the issue of the propriety of First Fidelity's actions are in large measure a question of state law.

12 C.F.R. § 9.10, which First Fidelity cites to support its contention that the fiduciary responsibilities of a national bank are governed by federal law, demonstrates that the trust powers of national banks are actually subject to state law. Part 9 of Title 12 of the Code of Federal Regulations, which relates to the fiduciary powers of national banks, repeatedly defers to "local law" in defining the rights and obligations of national banks. For example, 12 C.F.R. § 9.10(b) states that "[f]unds held in trust by a national bank . . . awaiting investment or

distribution may, unless prohibited by the instrument creating the trust *or by local law,* be deposited in the commercial or savings or other department of the bank." 12 C.F.R. § 9.10(b) (1982) (emphasis added). Similarly, 12 C.F.R. § 9.11(a) provides that "[f]unds held by a national bank in a fiduciary capacity shall be invested in accordance with the instrument establishing the fiduciary relationship *and local law*. 12 C.F.R. § 9.11(a) (emphasis added). *See also* 12 C.F.R. § 9.12 (specifying certain investment activities which may be undertaken by national banks if not proscribed by, or inconsistent with, local law); 12 C.F.R. § 9.14 (requiring national banks to deposit securities with state authorities if required by local law); 12 C.F.R. § 9.15 (authorizing national banks to charge a reasonable fee for performing fiduciary services if the amount of compensation for such activities is not regulated by local law); 12 C.F.R. § 9.16 (liquidator of national banks exercising fiduciary powers shall liquidate affairs of trust department in accordance with local law); 12 C.F.R. § 9.18 (describing permissible method of collective investment by national banks "where not in contravention of local law").

The term "local law" as used in these regulations "means the law of the State or other jurisdiction *governing the fiduciary relationship.*" 12 C.F.R. § 9.1(g) (emphasis added). This definition clearly establishes the primacy of state law in regulating the fiduciary activities of national banks and demonstrates that the draftsmen of the federal regulations considered the fiduciary activities of national banks to be governed by state law. This interpretation is consistent with the purpose of the statute pursuant to which these regulations were implemented.

12 U.S.C. § 92a authorizes the Comptroller of the Currency to grant a national bank the right to act as a trustee or in any other fiduciary capacity if state banks and similar institutions are permitted to do so under the state law provided that such authorization is consistent with state and local law. 12 U.S.C.A. § 92a(a) (West 1989 and Supp. 1992). The purpose of this statute was to create "competetive equality" between state and national banks with respect to trust services. *American Trust Co. Inc. v. South Carolina State Bd. of Bank Control,* 381 F. Supp. 313, 323 (D.S.C. 1974). Accordingly, the statute authorizes national banks to provide trust services to the same extent and subject to the same laws as the state banks in the jurisdiction in which they operate. In *New Hampshire Bankers Ass'n v. Nelson,* 336 F. Supp. 1330 (D.N.H.), *aff'd,* 460 F.2d 307 (1st Cir.), *cert. denied,* 409 U.S. 1001 (1972), the United States District Court for the District of New Hampshire addressed the issue of the validity of a state law prohibition on the advertising of trust services by national banks in New Hampshire. The court found that pursuant to 12 U.S.C. § 92a the trust activities of national banks were governed by state law. In this regard the court stated that

> [i]t is significant that this Section of the Act uses the phrase "when not in the contravention of State and local law." The Congress clearly intended that national banks should have the same rights as state banks *"under the laws of the State in which the national bank is located."*

Id. at 1333 (emphasis added). *See also St. Louis Nat'l Bank v. Mercantile Trust Co., et al.,* 548 F.2d 716 (8th Cir. 1976), *cert. denied,* 433 U.S. 909 (1977) (holding that pursuant to

12 U.S.C. § 92a a national bank's exercise of its fiduciary powers was subject to state law and that therefore the State of Missouri could limit the location where national banks would be permitted to exercise their fiduciary powers provided state banks were subject to the same limitations).

As 12 U.S.C. § 92a and the regulations enacted by the Comptroller of the Currency pursuant to that statute demonstrate, state law governs the fiduciary activities of national banks. Therefore the issue of whether First Fidelity breached a fiduciary duty to the respondents in this case is clearly a question of New Jersey law, not federal law.[1] Accordingly, the adjudication of respondents' federal securities law claim in the prior federal action did not preclude the New Jersey Supreme Court from addressing the breach of fiduciary duty claim in this action. Moreover, since this is a question of state law, the New Jersey Supreme Court is the only court which could definitively resolve this issue.

POINT III

FIRST FIDELITY WAS AFFORDED AN OPPORTUNITY TO BE HEARD BEFORE THE NEW JERSEY SUPREME COURT RENDERED ITS DECISION AND THEREFORE THERE WAS NO DUE PROCESS DEPRIVATION.

It is well established that the procedural due process protections of the Fifth and Fourteenth Amendments

[1] The court in the federal action dismissed the respondents' pendent state claims, including their claim for breach of fiduciary duty, specifically providing that the "state court is the proper forum for the litigation of these causes of action." First Fidelity's Appendix, A-93.

include the right to notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) and cases cited therein; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). This Court has frequently recognized that due process is a variable concept which depends on the particular subject matter and circumstances of each given case. *See, e.g., Betts v. Brady*, 316 U.S. 455 (1942); *Moyer v. Peabody*, 212 U.S. 78 (1909). "[D]ue process of law has never been a term of fixed and invariable content. This is as true with reference to oral argument as with respect to other elements of procedural due process." *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 264, 275 (1949). *See also Magnesium Casting Co. v. Hoban*, 401 F.2d 516, 518 (1st Cir. 1968), *cert. denied*, 393 U.S. 1065 (1969) ("Due process does not require oral argument in every case, as is made apparent by the Supreme Court's summary reversal procedure on petition for certiorari.")

> By long practice, and frequently by express rules important substantive or procedural issues are fully and finally disposed of by the highest of tribunals wholly on written papers without oral argument of any kind. The requisites of that portion of due process described as "hearing" are satisfied by providing the parties with the opportunity of affirmatively advancing argument with supporting authority and a like opportunity for response and counter-argument by the adversary. *This may be done by briefs without oral argument.* Oral argument, as such, is rarely, if ever, so essential to elemental fairness as to orbit to a constitutional apogee.

Groendyke Transport, Inc. v. Davis, 406 F.2d 1158, 1162 (5th Cir.), *cert. denied*, 394 U.S. 1012 (1969) (emphasis added) (addressing the due process clause under the Fifth Amendment). *See also NLRB v. Local No. 42, Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers*, 476 F.2d 275 (3d Cir.), *cert. denied sub nom Local No. 42 Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers v. NLRB*, 412 U.S. 940 (1973). In that case, the Court of Appeals for the Third Circuit held that the local rule of that court which allows the appellate panel to dispense with oral argument when all members of the panel so agree after reviewing the appellate briefs and appendices does not violate the due process clause of the Fifth Amendment.

> Given the manner in which our rule operates, we are unwilling to say that a denial of oral argument pursuant to our local rule constitutes a violation of the Fifth Amendment. In an administrative law context, the Supreme Court said in *FCC v. WJR, The Goodwill Station*, 337 U.S. 265, 276, 69 S. Ct. 1097, 1103, 93 L. Ed. 1353 (1949): "Certainly the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or indeed even substantial ones, are raised." We see no reason why the same principle does not apply to judicial proceedings.

Id. at 276. *Accord, George W. Bennett Bryson & Co., Ltd. v. Norton Lilly & Co., Inc.*, 502 F.2d 1045, 1050 (5th Cir. 1974).

In this case, First Fidelity had more than ample opportunity to be heard by the New Jersey Supreme Court. It presented its arguments to that court in its brief filed in support of its appeal and at oral argument before that court. It was expressly given the opportunity by that

court to file supplemental briefs "on any theory of liability or defense previously pleaded." 127 N.J. at 361; 305 A.2d at 689-690. First Fidelity availed itself of this opportunity and filed a supplemental brief.

In their complaint, and as the New Jersey Supreme Court in its opinion recognized, respondents pleaded breach of fiduciary duty and constructive trust theories of recovery.[2] Respondents' App. 5. Thus, in response to the New Jersey Supreme Court's invitation to brief any theory of liability previously pleaded, First Fidelity could have briefed these theories in its supplemental brief. That First Fidelity filed a supplemental brief which did not address those theories reflects a decision or omission on its part, not a due process violation.

Indeed, based on the cases discussed above, it would not have been a due process violation had the New Jersey Supreme Court elected to hear First Fidelity's appeal without any oral argument. That court orally requested copies of all of the depositions which were taken in the case (see list at Respondents' App. 9), and therefore had the benefit of the depositions, all relevant documents which were presented to the trial court and the Appellant Division, and briefs from First Fidelity, the respondents and amicae. As there would have been no due process violation if that court had not held *any* hearing, then *a fortiori* there was no due process violation when it in fact

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[2] For example, the amended complaint in the First Count at ¶8(i) alleged that First Fidelity and the Commission breached their fiduciary duty by failing to give them adequate notice of the early redemption of the notes. Respondents' App. 5.

held a hearing at which First Fidelity appeared and participated.

Moreover, no property of First Fidelity has been taken or will be taken prior to a hearing before the trial court on the issue of what profit, if any, First Fidelity earned on the proceeds of the redeemed notes. There was insufficient evidence before the New Jersey Supreme Court on whether First Fidelity or the Commission made a profit on the unclaimed funds, and that court therefore remanded the case to allow First Fidelity an opportunity to be heard on this issue, consistent with due process protections. 127 N.J. at 366-367; 605 A.2d at 692-693.

First Fidelity's contention that it was deprived of its right to "notice" because the New Jersey Supreme Court did not announce to it the theory on which it would decide that case is specious. First Fidelity had actual notice, by virtue of the respondents' pleading, that they were alleging that First Fidelity breached its duty to give them mail notice of the early redemption and that they were seeking imposition of "a constructive trust upon the unclaimed funds, together with all interest accrued thereon." Respondents' App. 6. That First Fidelity did not anticipate that the New Jersey Supreme Court would uphold respondents' right to relief on this theory of the case does mean that First Fidelity lacked notice that it might be deprived of any interest that it earned on the proceeds of the redeemed notes.

First Fidelity's reliance on *Ford v. Reichert*, 23 N.J. 429, 129 A.2d 439 (1957) in support of its due process argument is misplaced. In *Ford*, the trial court charged the jury on contributory negligence when that defense was not

raised by the pleadings or listed as an issue in the pretrial order. In contrast to *Ford*, and as noted by the New Jersey Supreme Court in its plurality opinion, the pleadings in this case raised an issue as to breach of fiduciary duty. Thus, *Ford* is inapposite to the case before this Court.

The second basis on which First Fidelity relies in support of its contention that it was deprived of due process is similarly without merit. First Fidelity contends that the New Jersey Supreme Court reached its decision on "no evidence" in "presuming" that First Fidelity received fees for the various capacities in which it acted in connection with the notes.

In making this argument, First Fidelity inaccurately represents to this Court that there was no evidence below to support the presumption that First Fidelity was compensated for its responsibilities. In fact, there was substantial evidence before the New Jersey Supreme Court that First Fidelity indeed received such compensation.

An appendix which respondents had submitted to the Appellate Division and which became part of the record before the New Jersey Supreme Court contained, among other things, (i) the Resolution which authorized the issuance of the notes, which stated in § 606 that the "Commission shall pay to each Fiduciary (defined as the Trustee or Paying Agent) . . . reasonable compensation for all services rendered by it" under that Resolution (Respondents' App. 10); and (ii) the Escrow Deposit Agreement between the Commission and First Fidelity, which provided in § 20 for the Commission to pay the Escrow Agent (defined as First Fidelity) the sum of $3,500.00, together with reasonable fees and expenses of counsel (Respondents' App. 13). These documents,

which were also exhibits to the stipulation of facts that were jointly submitted by respondents and First Fidelity to the trial court below, clearly demonstrate that First Fidelity was compensated for its responsibilities as trustee, paying agent and escrow agent.[3]

There was thus credible evidence before the New Jersey Supreme Court from which it could correctly find, let alone presume, that First Fidelity was being compensated for the various capacities in which it served in connection with the notes. Accordingly, First Fidelity's contention that it was deprived of due process because of the New Jersey Supreme Court "presumed from no evidence" is meritless and does not present a federal question on which this Court can grant certiorari.

POINT IV

THERE IS NO JURISDICTIONAL BASIS ON WHICH THIS COURT CAN GRANT THE PETITION FOR CERTIORARI.

28 U.S.C. § 1257(a) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision

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[3] Moreover, even had such evidence not been before the New Jersey Supreme Court, that court nevertheless could have properly presumed that First Fidelity was being compensated for its services. A court cannot divorce itself from common sense. Obviously, First Fidelity did not perform the various services in connection with the notes because it was being generous or altruistic. Common sense dictates that First Fidelity performed those services because it was being compensated for doing so. To deny the New Jersey Supreme Court the right to apply common sense to the cases before it would be to exorcise reality from the judiciary.

> could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

This statute is a statute authorizing appeals and therefore must be strictly construed. *Silkwood v. Kerr-McGee Corp., etc., et al.*, 464 U.S. 238, 247 (1984), and cases cited therein.

As demonstrated *supra*, First Fidelity has not asserted any genuine federal issues for this Court to consider. The New Jersey Supreme Court rendered its decision based on state law, and that decision does not abridge any of First Fidelity's due process rights nor impinge on any federal banking regulations. Accordingly, for the reasons set forth in this brief, there is no jurisdictional ground on which this Court can grant certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that First Fidelity's petition for certiorari should be denied.

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Dated: August 24, 1992

APPENDIX

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APPENDIX A

GURTMAN, SCHOMER & SHURKIN, ESQS.
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Attorneys for Plaintiffs, Theodore Rudbart, Natalie Rudbart, Beverly Litoff and Benjamin Weltman

THEODORE RUDBART, NATALIE RUDBART, BEVERLY LITOFF and BENJAMIN WELTMAN, Plaintiffs, vs. NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION and FIRST FIDELITY BANK, N.A. Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: PASSAIC COUNTY Docket No.: L-025715-87 Civil Action
MADELINE OKIN, for herself and on behalf of all other persons similarly situated, Plaintiff, vs. NORTH JERSEY WATER DISTRICT SUPPLY COMMISSION and FIRST FIDELITY BANK, N.A., NEW JERSEY, Defendants.	SUPERIOR COURT OF NEW JERSEY CHARCERY DIVISION: BERGEN COUNTY Docket No. C-4150-87 Civil Action AMENDED COMPLAINT IN CLASS ACTION

Plaintiffs, Theodore Rudbart and Natalie Rudbart, residing at 72 Virginia Avenue, Clifton, New Jersey 07012, Beverly Litoff, residing at 900 Valley Road, No. B-2, Clifton, New Jersey 07013, and Benjamin Weltman, residing at 5-27 Sixth Street, Fair Lawn, New Jersey 07410, for themselves and for all other holders of certain 1984 Project Notes issued by defendant, North Jersey District Water Supply Commission, similarly situated complaining of defendants says:

FIRST COUNT

1. The plaintiffs were holders of certain North Jersey District Water Supply Commission 7-7/8% Project Notes due on June 15, 1987.

2. This action is brought by plaintiffs individually and on behalf of all other persons similarly situated whose joinder in this action is impracticable for the following reasons:

(a) The holders of said notes constitute a group the extent of which is known definitely only by defendant and may reside in areas which inhibit the assertion of the substantive relief requested herein.

(b) The holders of said notes constitute a group too numerous to efficiently present their similar claims individually without unduly burdening the court system.

3. There are questions of law and fact common to the class in the following respects:

(a) The cause of action is based upon assertions by plaintiffs that defendants failed to give or were otherwise negligent in giving sufficient notice to the class of

note holders informing them that the notes had been called for early redemption and as such, members of the class and the relief requested are based upon factual and legal claims which are derived from the plaintiffs status as noteholders.

(b) Any assertion of facts and law made by these plaintiffs therefore are exactly similar to those which could be made by any other member of the proposed class action.

4. Claims of the representative parties here are typical of the claims of the class in the following respects:

(a) Defendants actions in failing to give proper notice and/or negligence in failing to give sufficient notice to these plaintiffs are of a nature which will be shared by all members of the class who were similarly deprived of adequate notice.

5. The representative parties will fairly and adequately protect the interest of the class in the following respects:

(a) The interests of these names [sic] plaintiffs are in all respects the same as those that could be afforded to any other member of the class, as such, any relief afforded to the individually named plaintiffs inures in all respects to the benefit of the class.

6. The prosecution of this suit as separate actions rather than as a class action creates a risk either of inconsistent or varying adjudications and could thereby establish incompatible standards of conduct for any party opposing the class and adjudications with respect to individual members which would as a practical matter be

dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

7. The party opposing the class has acted or refused to act on grounds generally applicable to the class thereby making it appropriate for relief to be entered with respect to the class as a whole.

8. The plaintiffs further allege as follows:

(a) Plaintiffs are the holders of certain 1984 Project Notes in various denominations issued by North Jersey District Water Supply Commission (hereinafter the "Commission") on or about June 15, 1984 with a maturity date of June 15, 1987 with interest payable at the annual rate of 7 and 7/8 per cent.

(b) Said Notes are issuable pursuant to the powers granted to the District Water Commission by the Legislature pursuant to N.J.S.A. 58:5-1 et seq. and more particularly issued by viture of the Water Transmission Facilities Act (Chapter 167 of the Laws of 1962 of N.J., as amended) and more particularly under, and in accordance with a resolution of the Commission adopted April 25, 1984 entitled "Resolution Authorizing the Issuance of Project Notes of the North Jersey District Water Supply Commission as supplemented and amended.)

(c) Said Notes contain a provision by which the Commission may elect to redeem said Notes in whole or in part prior to maturity.

(d) On or about June 15, 1986 the Commission exercised its option to redeem said Notes.

(e) Defendant, First Fidelity Bank (hereinafter "Trustee") was the institution provided in the instrument through which the principal and interest was to be paid upon becoming due and owing.

(f) The money to satisfy the principal and interest on the Notes was to be drawn by Trustee from funds under an irrevocable letter of credit issued by Manufacturers Hanover Trust Company, New York, New York.

(g) Each of these Notes were in registered form and defendants were in possession of the full name and address of each and every Note holder.

(h) Plaintiffs were not given notice of the early redemption of the Notes and as a consequence did not redeem the Notes and were deprived of the use of their funds and the interest earned on said notes until defendants became aware of the redemption in December of 1986 after inquiring of defendant Commission as to the payment of the semi annual interest payment due on December 15, 1986.

(i) Defendants breached their duty to give adequate and sufficient notice to plaintiffs of the early redemption of the Notes by defendant Commission in that plaintiffs were registered holders of said notes and their names and addresses were within defendants possession and control and defendants acted unreasonably by making no effort to give actual notice to plaintiffs.

(j) As a result of their actions plaintiffs were deprived of the use and enjoyment of the funds payable pursuant to the early redemption.

WHEREFORE, plaintiffs demand judgment against defendants, jointly, severally or in the alternative:

(A) For damages, both compensatory and punitive.

(B) Imposing a constructive trust upon the unclaimed funds, together with all interest accrued thereon.

(C) Reforming the terms of the note issued to require notice by mail to the registered note holders.

(D) Awarding counsel fees.

(E) For such other relief as the Court may deem equitable and just.

SECOND COUNT

1. Plaintiffs, Theodore Rudbart, Natalie Rudbart, Beverly Litoff and Benjamin Weltman, repeat each and every allegation of the First Count as if set forth at length herein.

2. The aforesaid notes provided for notice of redemption by publication only; not requiring notice by mail to the registered note holders.

3. The aforesaid notice provision was unconscionable, inequitable and constitutes a fraudulent practice and violation of law.

WHEREFORE, plaintiffs demand judgment against defendants, jointly, severally or in the alternative:

(A) For damages, both compensatory and punitive.

(B) Imposing a constructive trust upon the unclaimed funds, together with all interest accrued thereon.

(C) Reforming the terms of the note issued to require notice by mail to the registered note holders.

(D) Awarding counsel fees.

(E) For such other relief as the Court may deem equitable and just.

THIRD COUNT

1. Plaintiffs, Theodore Rudbart, Natalie Rudbart, Beverly Litoff and Benjamin Weltman, repeat each and every allegation of the First Count and Second Count as if set forth at length herein.

2. Upon information and belief, the defendant, First Fidelity Bank, N.A., trustee, underwriter and escrow agent for the aforesaid note issue, breached its fiduciary duty in failing to notify by mail all note holders.

3. Upon information and belief, the defendant, First Fidelity Bank, N.A., kept unclaimed note holders' funds for approximately six (6) months, earning interest on such funds, unjustly enriching itself while failing to honor note holders' claims for interest.

WHEREFORE, plaintiffs demand judgment against defendants, jointly, severally or in the alternative:

(A) For damages, both compensatory and punitive.

(B) Imposing a constructive trust upon the unclaimed funds, together with all interest accrued thereon.

(C) Reforming the terms of the note issued to require notice by mail to the registered note holders.

(D) Awarding counsel fees.

(E) For such other relief as the Court may deem equitable and just.

GURTMAN, SCHOMER &
SHURKIN
Attorneys for Plaintiffs, Theodore
Rudbart, Natalie Rudbart, Beverly
Litoff and Benjamin Weltman
By

s/ _____
FRED RABINOWITZ

APPENDIX B

LIST OF DEPONENTS

DEPONENT	DEPOSITION DATE
George L. Bielitz, Jr.	October 1, 1987
James T. Byers	September 21, 1987
Bernard S. Davis	October 27, 1987
Charles E. Hoos	September 10, 1987
Andrea L. Kahn	October 27, 1987
Edward D. Knapp	September 30, 1987
John C. Leeds	September 15, 1987
Wilmer Leinbach	December 11, 1987
Julie Miller	November 9, 1987
Rosario Paladino	October 27, 1987
Gerhard J. Reidel	October 22, 1987
Richard Schmude	October 22, 1987
Leonard Trueblood	October 21, 1987
Arthur T. Vanderbilt	January 7, 1988
Gerald F. Volpe	October 13, 1987
Alex Williams	October 22, 1987

APPENDIX C

RESOLUTION AUTHORIZING THE ISSUANCE OF PROJECT NOTES OF THE NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION

BE IT RESOLVED BY the North Jersey District Water Supply Commission as follows:

ARTICLE I

DEFINITIONS AND INTERPRETATIONS

Section 101. *Short Title.* This resolution may hereafter be cited by the Commission, and is hereinafter sometimes referred to, as the "Resolution".

Section 102. *Definitions.* As used or referred to in this resolution, unless a different meaning clearly appears from the context:

"Act" means the Water Transmission Facilities Act constituting Chapter 167 of the Laws of 1962 of the State of New Jersey, and the acts amendatory thereof and supplemental thereto;

"Authorized Newspaper" means (a) a newspaper or newspapers designated by the Commission and of general circulation within the contracting municipalities, as defined in the Act, and (b) one newspaper which is customarily published at least once a day for at least five days (other than legal holidays) in each calendar week, printed in the English language, and published and of general circulation in the Borough of Manhattan, City and State of New York;

"Commission" means the North Jersey District Water Supply Commission;

"Cost" or "Costs" means cost or costs as defined in the Act;

"Debt Service Account" means the account so designated which is established and created by Section 503;

* * *

Section 605. *Evidence on Which Fiduciaries May Act.* Each Fiduciary shall be protected in acting upon any notice, resolution, request, consent, order, certificate, opinion, bond, or other paper document believed by it to be genuine and to have been signed or presented by the proper party or parties. Each Fiduciary may consult with counsel, who may or may not be counsel to the Commission, and the opinion of such counsel shall be full and complete authorization and protection in respect of any action taken or suffered by it hereunder in good faith and in accordance therewith. Whenever any Fiduciary shall deem it necessary or desirable that a fact or matter be proved or established prior to taking or suffering any action hereunder, such fact or matter (unless other evidence in respect thereof be herein specifically prescribed) may be deemed to be conclusively proved and established by a certificate of a Commission officer stating the same, and such certificate shall be full warrant for any action taken or suffered in good faith under the provisions of the Resolution upon the faith thereof, but in its discretion the Fiduciary may in lieu thereof accept other evidence of such fact or matter or may require such further or additional evidence as to it may seem reasonable. Except as otherwise expressly provided herein, any

request, order, notice or other direction required or permitted to be furnished pursuant to any provision hereof by or on behalf of the Commission to any Fiduciary shall be sufficiently executed if executed by a Commission officer.

Section 606. *Compensation and Expenses.* Unless otherwise provided by contract with the Fiduciary, the Commission shall pay to each Fiduciary from time to time reasonable compensation for all services rendered by it hereunder, and also reimbursement for all its reasonable expenses, charges, legal and engineering fees and other disbursements and those of its attorneys, agents and employees, incurred in and about the performance of its powers and duties hereunder, and each Fiduciary shall have a lien therefore on any and all funds at any time held by it hereunder. The Commission shall indemnify and save each Fiduciary harmless against any liabilities

* * *

APPENDIX D

THIS ESCROW DEPOSIT AGREEMENT (the "Agreement"), made and dated as of the 1st day of September, 1985

BETWEEN

NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION (the "Commission"), a public corporate and politic organized and existing under and by virtue of the laws of the State of New Jersey (the "State"),

AND

FIRST FIDELITY BANK, NATIONAL ASSOCIATION, NEW JERSEY, a national banking association doing business and having its principal office in Newark, New Jersey (hereinafter referred to as the "Escrow Agent") in its capacity as trustee under the Prior Note Resolution hereinafter described,

WITNESSETH:

WHEREAS, the Commission is a public body corporate and politic organized and existing under and by virtue of the laws of the State, organized and existing under Water Transmission Facilities Act, constituting Chapter 167 of the Laws of 1962 of the State, and the acts amendatory thereof and supplemental thereto heretofore adopted (the "Act"); and

WHEREAS, the Escrow Agent is organized and existing under the laws of the United States of America and is duly qualified and authorized to do business in the State,

having its principal office and place of business in Newark, New Jersey; and

WHEREAS, the Commission has previously issued $75,000,000 aggregate principal amount of its 1984 Project Notes (the "Prior Notes") previously authorized by the resolution of the Commission adopted April 25, 1984, entitled "Resolution Authorizing the Issuance of Project Notes of the North Jersey District Water Supply Commission", as amended and supplemented (the "Prior Note Resolution") and authenticated and delivered pursuant thereto; and assigned by either the Commission or the Escrow Agent without the prior express written consent of the other party.

* * *

Section 20. Concurrently with the execution of this Agreement, the Commission will pay to the Escrow Agent the sum of $3,500 (together with reasonable fees and expenses of counsel to the Escrow Agent) which shall be the only sum payable hereunder by the Commission to the Escrow Agent, except as provided in Section 14 hereof, and except for the costs of publications that may be required hereunder or under the Prior Note Resolution. The cost of each publication shall be paid by the Escrow Agent and reimbursed by the Commission, upon receipt of a publisher's affidavit with respect to such publication and a copy of the invoice therefor.

Section 21. The Escrow Agent shall report to the Commission upon written request as to the balance and securities held in the Escrow Account, and the investment earnings and deposits credited to and withdrawals from the Escrow Account.

Section 22. The date of this Agreement shall be for identification purposes only. This Agreement shall be effective on September 26, 1985.

* * *